IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 1

ALFONSE BARTKUS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR PETITIONER ON REHEARING

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Preliminary Statement

This case was argued in this Court on November 19, 1957. On January 6, 1958 the judgment below was affirmed by an equally divided Court. 355 U.S. 281. On May 26, 1958 the Court granted our petition for rehearing, vacated the judgment entered January 6, 1958 and restored the case to the calendar for reargument. 356 U.S. 969.

For Opinion Below, Jurisdiction, Questions Presented, and Statutes Involved, see our main brief, pp. 2 and 3. For Statement of the Facts, see our main brief, p. 5.

We rely on our main brief. We do not propose to repeat it here. Our purpose in this additional brief on rehearing is to discuss cases that have come up in the Court since the original argument. We repeat our main headings for convenience of reference.

ARGUMENT

I

To Try a Man Over Again for the Same Offense After Acquittal Is So Fundamentally Unfair as to Constitute a Violation of Due Process. Neither the States Nor the Federal Government Can Do It Alone; It Is No Less Unfair When Done by Both Together.

(See same heading in our main brief, pp. 20-77)

In further support of the foregoing proposition we adduce what the Court has said since the original argument. In *Hoag* v. *New Jersey*, 356 U.S. 464, 467, the Court said:

> "We do not think that the Fourteenth Amendment always forbids States to prosecute different offenses at consecutive trials even though they arise out of the same occurrence. The question in any given case is whether such a course has led to fundamental unfairness."

That clearly implies that there *are* situations where consecutive trials would be a denial of due process under the Fourteenth Amendment.

Besides the *Hoag* case the Court has, since the original argument in our case, decided two other cases involving double jeopardy: *Green* v. *United States*, 355 U.S. 184, and

Ciucci v. *Illinois*, 356 U.S. 571. All three cases are wholly consistent with the position taken in our main brief. That is true even apart from the distinguishing feature that the successive trials given Hoag and Ciucci were based on *different* victims, whereas Bartkus was tried twice on the charge of robbing the *same* victim.

In this brief, therefore—apart from the question of federal-state relationship—we do not consider it necessary to argue that Bartkus' life imprisonment, of which he has already served four years, is a violation of due process. That leaves, then, only the question of federal-state relationship, namely, whether state and nation, as between each other, can, after a man has been acquitted, retry him for the same act under statutes that are so similar that if both were federal statutes retrial would be prevented by the double jeopardy provision of the Fifth Amendment and if both were state statutes retrial would be prevented by the due process clause of the Fourteenth Amendment.

Restating it, the question is if state and nation are each forbidden to have two tries at a man, can they nevertheless do it in combination? Is there this gap in the regular constitutional protection?

If such a gap is really necessary as a practical condition of the success of American federalism, we must, of course, put up with it. However unjust, however inconsistent, however flagrant a violation of ancient principle, we would have to endure it as one of those "embarrassments" referred to in the conclusion of the Court's opinion in *Knapp* v. *Schweitzer*, 357 U.S. 371, 380, that " . . . whatever inconveniences and embarrassments may be involved, they are the price we pay for our federalism, for having our people amenable to—as well as served and protected by—two governments. . . . Against it must be put what would be a

greater price, that of sterilizing the power of both governments by not recognizing the autonomy of each within its proper sphere."

That is a general principle, but the Court must decide when it is applicable. We submit that the power of both governments would *not* be sterilized by closing this particular gap in the regular constitutional protection. We submit that there is no reason to pay an appreciable price to keep it open. We submit that the autonomy of each would *not* be impaired by a reciprocal rule requiring nation and state to respect each other's criminal judgments as they respect each other's civil judgments.

In our main brief (pp. 58-77) we cite authorities and materials substantiating this position. They even indicate, on balance, that a rule permitting duplicate successive prosecutions would harm rather than help federal-state effectiveness.

The issue in our case is only reached because there is no difference of any significance between the federal and state statutes.

The double jeopardy problem is not reached where there is any significant difference between the federal and state statutes. In our case only the jurisdictional difference distinguishes the two offenses. The Solicitor General so classifies our case in his brief, p. 20, in *Abbate* v. *United States,* No. 7 this Term. That also is our interpretation of the position of the State of Illinois, see our original reply brief, p. 3.

We need not say, with the dissenting opinion of Mr. Justice Douglas in *Hoag* v. *New Jersey,* 356 U.S. 464, 479, that there can constitutionally be no retrial "for a crime growing out of the identical facts and occurring at the same

time."[1] For our case does not take us so far. We concede that there *can*, for double jeopardy purposes, be two offenses arising out of the same act of the defendant,[2] provided that the two offenses are different in substance as applied to the defendant's act. This would be so where each offense has a different gist. An example is selling liquor to a minor on Sunday. This is the issue in *Abbate*, No. 7, where the United States argues that the federal and state statutes protect different interests, and hence the purposes and policies of the two statutes are different.[3] If the Court finds that they really are different, successive prosecutions are warranted.

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[1] Mr. Justice Douglas says that his dissenting opinion in *Hoag* (at 478, footnote 3) appears to be inconsistent with *Gavieres* v. *United States*, 220 U.S. 338. However that may be, our position is not inconsistent with *Gavieres*. In *Gavieres* the two statutes had different purposes or policies, a difference discussed in the Court's opinion in that case. For fuller discussion of the *Gavieres* case see our main brief, pp. 35-37.

[2] "Two offenses" for double jeopardy purposes are to be distinguished from two offenses for purposes of double or multiple punishment. See our main brief, pp. 31-32. It is temptingly convenient to use the term "offense" for an interchangeable "unit of prosecution" for all purposes, but it is not valid. The difficulty is brought out by *Gore* v. *United States*, 357 U.S. 386, where a single sale of narcotics was held to be the following three offenses for the purpose of cumulating punishment: (1) making the sale not in pursuance of a written order, (2) not in the original stamped package, and (3) facilitating the concealment and sale of narcotics. Such multiple punishment is very different from the unthinkable proposition that Gore, after having been acquitted of one of those offenses, could be tried over again for the others on the basis of the same sale. We have no quarrel with the *Gore* case or with *Blockburger* v. *United States*, 284 U.S. 299, also a case of punishment at one trial.

Ladner v. *United States*, No. 2 this Term, is likewise a punishment case. Ladner was not being tried over again either by the same or a different jurisdiction. We are not concerned with the outcome of *Ladner*. Nor is the Solicitor General in *Abbate*. He does not mention *Ladner* in his *Abbate* brief.

[3] See Solicitor General's brief in *Abbate* v. *United States*, pp. 18-29. See our main brief, pp. 33-38.

For a single act to constitute two crimes for which a man can be successively tried, the gist, purpose or policy of the statutes must be different. These differences may or may not exist when the two offenses are created by statutes of different jurisdictions. Where such differences exist, there may be successive prosecutions; for example, a state prosecution for assault or murder would not bar a subsequent federal prosecution for violation of the civil right to vote.[4] To permit successive prosecutions, all the Court need do is to find that the federal purpose or policy is different from that of the state. This distinction is grounded in world-wide principle. If a man has been acquitted in Italy for an act of treason, for example, he may be retried in France, for French policy naturally would be different from that of a foreign country in security cases.[5] But in cases of common crimes, like robbery or murder, an acquittal in a foreign country is recognized as sacred by civil law countries[6] as well as by England.[7]

In our case, we submit, there cannot be successive state and national prosecutions because the interest protected by the federal statute is not different from that protected by the state statute. There is no contention that the purpose of the federal statute was different—that, for example, it was designed to conserve federal funds. The legislative history makes clear that the original 1934 act was concerned exclusively with enforcement.[8] It was designed to provide the assistance of federal enforcement facilities where local forces were unable to cope with the situation.

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[4] This situation is discussed in our main brief, pp. 59-61.

[5] Reply brief for petitioner, p. 5.

[6] Reply brief for petitioner, p. 4.

[7] Petitioner's main brief, pp. 40-42.

[8] See petitioner's main brief, pp. 37-38.

Later, when state savings and loan associations were provided with federal insurance, that feature of the robbery statute was simply added as a basis for extending to institutions so insured the same jurisdictional basis for federal enforcement.[9]

When a case like the present one reaches the Court it is faced with determining whether the difference between the two statutes has constitutional significance so as to permit successive trials. The constitutional issue would be raised even if one of the statutes had expressly declared that it was protecting a different interest from that protected in the other jurisdiction by the other statute. Certainly, a separate policy producing double jeopardy is not lightly to be implied. In the present case there not only is no statutory declaration to that effect, but the legislative history shows that none was intended.

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[9] U. S. CODE CONG. SERV. 2863-2864 (1950). The House Committee on the Judiciary reported:

> "The Committee has been informed that in certain localities robberies of savings and loan associations appear to follow the pattern wherein the Federal chartered institutions are not robbed, and the State chartered institutions are the ones which are the victims of such robberies. The thought has reached the Committee that the explanation of this fact may be that anyone planning such a robbery would avoid an institution wherein the offense would be a Federal crime . . .
>
> • • •
>
> "Should a crime . . . occur, the strong arm of the Federal Government's law enforcement agencies, including the Federal Bureau of Investigation, could with propriety enter the case and lend assistance in the apprehension and punishment of the guilty."

96 CONG. REC. 8302 (1950):

> "Mr. Hendrickson: Mr. President, may we have an explanation of the bill?
>
> "Mr. McCarran: The purpose of this bill is to extend the protection of the criminal statutes to State-chartered savings and loan associations, the accounts of which are insured by the Federal Savings & Loan Insurance Corporation."

In our case, where the jurisdictional difference is the only difference between the two offenses, successive prosecutions are unnecessary to protect federal supremacy.

In *Abbate* the Solicitor General concludes his brief with the point that: "Under our system of government, a state should not be able to preclude the Federal Government from enforcing federal law." That is a general expression of federal supremacy with which we do not disagree, but we do disagree with the inference which the Solicitor General draws from it. He makes the unjustified assumption that the right method of protecting federal supremacy is to try the acquitted (or convicted) man over again. That, we submit, is the wrong method. There is no need to stoop so low. When state prosecutions become ineffective in some area of concurrent jurisdiction, Congress has a clear remedy—it can pre-empt the field. That is the proper method of asserting federal supremacy. That does not mean that Congress need take over the whole field, the whole area of federal jurisdiction involved. As we point out in our main brief, p. 64, Congress might make a partial pre-emption.[10] For example, Congress might provide that no state prosecution for federal bank robbery shall be commenced until, say, thirty days after notifying the United States Attorney, so that there may be a federal rather than a state trial. The ample resources of federal pre-emption are always available as the regular constitutional method of protecting federal jurisdiction and of making sure that there be no race to the courts.[11]

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[10] Pre-emption may, of course, be partial. *Ex parte Siebold*, 100 U.S. 371, 383 (Bradley, J. for the Court).

[11] Pre-emption is a more practically reliable method than trying to prove that the first trial was collusive, as we indicate on page 61 of our main brief.

We do not urge full pre-emption as a solution. Concurrent jurisdiction between state and nation is a most desirable feature of the American constitutional system. It promotes decentralization of

The reason why federal pre-emption is always available is because the problem of duplicate trials arises only in areas of concurrent jurisdiction—i.e., where either the state or the nation has sole jurisdiction the problem cannot arise.

The availability of federal pre-emption distinguishes the present case from the *Lanza* case.[12] *Lanza* arose under the Eighteenth Amendment. The Eighteenth Amendment provided that "the Congress and the several States shall have concurrent power," and the Court said in *Lanza* that that exceptional kind of concurrent power "put an end to restrictions upon the States' power arising out of the Federal Constitution. . . ."[13] The language of the Eighteenth

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government and reduces the work load of the federal courts. See our main brief, p. 65. Yet, to prevent its being used to work injustice, the judgment of one jurisdiction must be respected by the other. If this is not done, pre-emption will in fact be encouraged. Already that suggestion of injustice has been given weight by this Court in reaching the conclusion that Congress has taken over a field. *Pennsylvania* v. *Nelson*, 350 U.S. 497, 509, discussed in our main brief, pp. 65-66.

Concurrent jurisdiction in the American sense does not exist in the great democratic federalisms of Canada, Australia and Switzerland. (As to Canada and Australia, see Grant, 4 U.C.L.A. L.Rev. 16-25; as to Switzerland, where most crimes are created by the federal government and prosecuted by the cantons, see Giacometti, *Schweizerisches Bundesstaatsrecht* (Zurich, 1949), pp. 833-4, 843, 846-9). In those countries a crime is prosecuted by either the federal authorities on the one hand or by the provincial, state or cantonal authorities on the other. In Canada the American system is regarded as unjust because cases like *Lanza* (footnote 12, *infra*) suggest the possibility of successive prosecutions. But, as we have urged, successive prosecutions are not necessary to American concurrent jurisdiction.

[12] *United States* v. *Lanza*, 260 U.S. 377. Discussed in our main brief, pp. 53-55.

[13] *Id.* at 381. In his *Abbate* brief, p. 13, the Solicitor General overstates our position when he says that we seek to have this Court reconsider its holding in *Lanza*. It is true that we wish to have reconsidered what some courts have thought *Lanza* stood for. But what we seek is to prevent *Lanza* from being extended to situations neither within its holding nor justified by its reasoning.

I.

THE CONSTITUTIONALITY OF PETITIONER'S STATE CONVICTION IS VINDICATED BY THE TEACHINGS OF HOAG V. NEW JERSEY, 356 U. S. 464, GREEN V. UNITED STATES, 355 U. S. 187, CIUCCI V. ILLINOIS, 356 U. S. 571, AND KNAPP V. SCHWEITZER, 357 U. S. 371, ALL DECIDED SINCE THE ORIGINAL ARGUMENT IN THE INSTANT CASE.

In *Hoag* v. *New Jersey*, 356 U. S. 464, this Court sustained as against a contention that double jeopardy denied due process of law the conviction in the State courts of New Jersey of the defendant Hoag of the robbery of one individual although he had previously been acquitted of the robbery of another person, both victims having been robbed virtually simultaneously in the same tavern robbery, the only question being whether the defendant Hogue was a participant in the crime.

In *Ciucci* v. *Illinois*, 356 U. S. 571, this Court sustained the conviction and imposition of the death penalty upon the defendant Ciucci for the murder by shooting and arson of a building of one of his children although he had been convicted of the virtually simultaneous shooting of his wife and the virtually simultaneously shooting of another child, the same arsonist burning being in all three cases.

These cases, read compositely, utter the Court's contemporaneous adherence to its holding in *Palko* v. *Connecticut*, 302 U. S. 319, that successful trials either for a single offense, such as was involved in *Palko*, or for differentiated aspects and results of the same transaction, such as was involved in *Hoag* and *Ciucci*, do not *per se* deny due process of law.

Amendment prevented federal pre-emption in the field of liquor regulation, in whole or in part. While the Eighteenth Amendment was in effect there was one field of concurrent jurisdiction which Congress could not take over. So, however unfair double prosecutions may have been, a state's immunity from pre-emption gave a reason for finding that the power of the federal government under the Eighteenth Amendment would have been sterilized unless double prosecutions were allowed. That reason does not exist where pre-emption is constitutionally available, as in the present case.[14]

Prohibiting successive prosecutions does not restrict the basic constitutional power of the states.

State jurisdiction to prosecute for federal bank robbery exists only at the sufferance of Congress. That is to say that a decision by this Court in our favor would not deprive the state of anything which Congress could not deprive it of at any time. Such a decision, therefore, would be unlike a decision restricting the otherwise immutable power of a state: for example, a decision that the state has interfered

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[14] In the Solicitor General's *Abbate* brief, p. 33, n. 13, he discusses our argument based on the Seventh Amendment, rightly saying that if identity of parties and issues could be shown "the Fifth Amendment would itself bar the second trial." In our case the issues are admittedly the same, and we contend that the difference in "the prosecuting sovereigns" is not material. We regard the Seventh Amendment's bearing on the interpretation of the Fifth as a strong independent argument in favor of our position. It is fully explained in our main brief, pp. 61-63, and our reply brief, p. 6. We have since found additional support for our position in Rutland, *Birth of the Bill of Rights*, U. of N. C. Press (1955). Taken as a whole the facts in this book strongly indicate at the time of the adoption of the Bill of Rights and in view of the public willingness to reject state constitutions that had recently been submitted, it is unlikely that the citizens would have been satisfied with an interpretation of the Bill of Rights which would have permitted the federal government to re-examine state criminal judgments (under the Fifth Amendment) when it could not re-examine state civil judgments (under the Seventh Amendment).

In *Green* v. *United States*, 355 U. S. 184, this court held that an acquittal of murder in the first degree barred a subsequent trial for murder in the second degree *when there was no evidence to support a conviction of murder other than in the first degree.* It reached this conclusion under the Double Jeopardy clause of the Fifth Amendment and not under the Due Process clause of that or of the Fourteenth Amendment. The *Green* case does not involve repudiation of *Palko* v. *Connecticut*, which declares that the Double Jeopardy clause of the Fifth Amendment is not imported into the Due Process clause of the Fourteenth Amendment.

There remains for consideration petitioner's contention, ardently urged in his original and reply briefs and renewed in his present brief on rehearing, that there has been in this case such violation of the precepts of fundamental fairness or such oppression as to invoke the Due Process Clause of the Fourteenth Amendment in nullification of his conviction in Illinois after his acquittal in the Federal courts for the same robbery of a building and loan association.

We do not repeat the demonstration in our original brief that prosecutions by State and Federal authorities for the same offense have consistently been held not to involve even technical "double jeopardy" and certainly have never been held to deny due process of law.

The contrary has been the effect of this Court's declarations. *U. S.* v. *Lanza*, 260 U. S. 377, *Herbert* v. *Louisiana*, 272 U. S. 372, *Fox* v. *Ohio*, 5 Oh. 410. The tenets of these cases is re-enforced in principle by the *Hoag* and *Ciucci* cases and is not disturbed by the *Green* case.

We must note, however, that petitioner's counsel's concession that where "the gist, purpose or policy" of two statutes is "different", even though the statutes are those of the same sovereign, "there may be successive prosecu-

with freedom of speech or association, as in *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449. Compared with such decisions a decision in petitioner's favor would be of a lesser order of interference with the states. In fact, from the standpoint of fundamental constitutional power, it would not be a restriction on the states at all but on Congress—on the power of Congress to let the states and the federal government reciprocally indulge in the injustice of duplicate trials. The ever present power of Congress to pre-empt a field of concurrent jurisdiction means that the decision we seek would not change the constitutional allocation of powers between state and nation.

In any event, it would seem to restrict the states in no substantial way to compel them to apply the same rule of double jeopardy to prior federal judgments that the Fourteenth Amendment compels them to apply to their own prior judgments. In other words, whenever it is a violation of due process for a state to retry a man for the same occurrence when he was tried the first time by the state, it can hardly be a substantial restriction of a state's system of criminal justice to forbid the retrial *for that same occurrence* when he was tried the first time by the federal government.[15]

The unfairness of compelling a man to run the gantlet twice under duplicate statutes is extreme.

(1) Let us suppose that a state criminal statute has been enacted for the very purpose of protecting a federal right; for example, a statute to enforce a provision of the

[15] It is worthy of note that a second trial for the same offense is prohibited in all the states and by the constitutions of 43 of them (see our main brief, p. 28).

tions" (*Petitioner's Brief on Rehearing*, p. 6) virtually confesses away his case; for the purpose of the Illinois statute was to punish armed robbery in protection of the citizens or other persons within Illinois and their property, whereas the purpose of the Federal statute was to protect the interest of the United States in its Federal insurance of State banks and building and loan associations. Indeed, were this latter not the purpose of the Federal act and were it the purpose of the Federal act merely to inhibit armed robbery, the statute would be unconstitutional as being beyond the powers of the Federal government.

Conclusion.

For the reasons urged in Respondent's Original Brief and reinforced by the suggestions developed in this brief, we respectfully submit that the judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

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postal laws which is cast in the same terms as the federal statute.[16]

(2) Let us suppose that in some federal enclave where there is concurrent jurisdiction with the state[17] the state has, for example, created a sex crime which thereby becomes a federal crime by virtue of the Assimilative Crimes Act.[18]

These examples of precisely parallel statutes highlight our position that the mere difference in jurisdictions ought not to permit successive prosecutions. For state and nation to try a man successively under two statutes which protect the same interest would, we submit, produce the fundamental unfairness which this Court mentioned in *Hoag* v. *New Jersey*, 356 U.S. 464, 467, as determining the pattern of due process. This would be true whether the state or the nation tries the man first. It would reduce the phrase "same offense" in the double jeopardy provision of the Fifth Amendment to a form of words.[19] It would reduce the due process clause of the Fourteenth Amendment to an empty conceptualism.

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[16] ". . . Congress, in the first fifty years, left to the State Courts concurrent jurisdiction with the Federal Courts over certain offenses against the criminal and penal statutes of the United States, and trial in the State Courts of such violations of Federal criminal law was regarded by Congress as natural, feasible, and desirable." Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545. While state courts for a time refused to believe that they could be authorized to enforce federal law, that position has been rejected. Warren, *op. cit.*, pp. 577-590. See *Testa* v. *Katt*, 330 U.S. 386. The federal statute authorizing state enforcement of the postal laws is still in effect. 39 U.S.C. § 825.

[17] Pursuant to 18 U.S.C. § 7(3). See our main brief, p. 65, n. 47.

[18] 18 U.S.C. § 13. See *United States* v. *Sharpnack*, 355 U.S. 286.

[19] Cf. Holmes, J., for the Court in *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392: "It reduces the Fourth Amendment to a form of words."

Concurrent criminal jurisdiction, of course, means that either the state or the nation may prosecute. The Solicitor General in his *Abbate* brief, pp. 40-42, quotes examples of the numerous decisions that where there is concurrent jurisdiction both the state and the federal government can create crimes and punish violators. That is well established; but it does not justify the conclusion of some courts that after the accused has been acquitted (or even convicted) in *one* jurisdiction he can be prosecuted in the other. See our main brief, esp. pp. 44-49. Our position is so well expressed by the dictum of Justice Brewer (for a unanimous Court in *Nielsen* v. *Oregon*, 212 U.S. 315, 320) as the proper rule for concurrent jurisdiction between two states, that although we have quoted this passage twice in our main brief (pp. 49, 69), we paraphrase it here, substituting the word "jurisdictions" for "states." It succinctly states the rule for which we are contending:

> "Where an act is *malum in se* prohibited and punishable by the laws of both [jurisdictions], the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both [jurisdictions], so that one convicted or acquitted in the courts of the one [jurisdiction] cannot be prosecuted for the same offense in the courts of the other."

CERTIFICATE OF SERVICE.

I, William C. Wines, a member of the bar of this Court and an Assistant Attorney General of the State of Illinois, hereby certify that on the 30th day of September, 1958, I served five copies of the Brief of Respondent on Rehearing upon Walter T. Fisher, 135 S. La Salle Street, Chicago 3, Illinois, counsel for Petitioner.

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WILLIAM C. WINES,
Assistant Attorney General of the State of Illinois.

II

Whether or Not Wholly Independent Successive Prosecutions by State and Federal Authorities Ever Accord Due Process, Petitioner Was Denied Due Process Here Where Federal Officers Initiated and Participated in the Retrial of a Man Adjudged Innocent by a Federal Court and Where the State Conviction Thus Rests on the Unconstitutional Conduct of Federal Officers.

(See same heading in our main brief, pp. 78-81)

In *Knapp* v. *Schweitzer*, 357 U.S. 371, 380, the Court found that "the record before us is barren of evidence that the State was used as an instrument of federal prosecution or investigation" but said: "If a federal officer should be a party to the compulsion of testimony by state agencies, the protection of the Fifth Amendment would come into play." Equally, the double jeopardy provision of the Fifth Amendment should come into play to protect petitioner from what we contend are forbidden activities of federal officers; for, we submit, the Fifth Amendment must mean that federal acquittal bars subsequent federal efforts to obtain state conviction.

Beyond that, we have nothing to add to what we say in our main brief on the conduct of the federal officers in this case except, in view of what the Court said in *Ciucci* v. *Illinois*, 356 U.S. 571, to point out that the activities of the federal agents in working toward the conviction of Bartkus after he had been federally acquitted are a matter of record. See our main brief, pp. 6-8.[20]

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[20] Our position is justified by those activities alone. It is additionally justified by the action of the federal judge in seeking to bring about a second trial. That action, though not of record and shown only by newspaper articles and the Federal Reporter, is a matter of which the Court can, we submit, take judicial notice in view of the statement of the United States Court of Appeals for the Seventh Circuit that his conduct received wide publicity. See our main brief, p. 6, n. 2, 3.